IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM SWAIN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	
and RICHARD NEAL	:	**NO. 98-4247**

MEMORANDUM ORDER

Plaintiff commenced this action in the Philadelphia Common Pleas Court in June 1998. In his complaint, plaintiff alleges that on July 14, 1996 Philadelphia police officers "negligently" interfered with his custodial rights by removing his two children while serving a protection from abuse order secured by his estranged wife. Plaintiff alleges that although the order did not deal with custody, plaintiff's estranged wife was able to remove the children to the home of a relative in Washington, D.C.

"As a result of the negligence of the Defendants," plaintiff incurred expenses and suffered mental anguish. Ultimately, a court ordered shared custody of the two children. Plaintiff also alleges that "[a]s a result of the negligence of the Defendants the Plaintiff was denied his rights under the Constitution of the United States and the constitution of Pennsylvania."

Plaintiff did not assert claims against the officers who assisted his wife in obtaining physical custody of the children. Rather, he alleges that defendants failed properly to

train and supervise these officers and that "the negligence of the police officers is imputed to the Defendants as employers."

On July 21, 1998, plaintiff mailed a copy of the complaint to defendants. On August 13, 1998, defendants removed the action to this court based on plaintiff's assertion about the denial of unspecified constitutional rights. Presently before the court is defendants' Motion for Sanctions for Failure to Prosecute in which they seek dismissal as a sanction for plaintiff's failure to engage in discovery and to allow the case fairly to proceed to trial as scheduled.

On August 28, 1998, defendants moved to dismiss the complaint on the ground that it was barred by the statute of limitations. Plaintiff did not respond. By order of October 23, 1998, the court nevertheless denied the motion since it appeared from exhibits submitted by defendants in support of their motion that plaintiff’s action had been timely commenced. By order of November 11, 1998, the court directed that discovery be completed by February 20, 1999 and that the case be placed in the trial pool of April 1, 1999.

Defendants represent that on November 30, 1998 they served discovery requests on plaintiff who, without explanation, thereafter failed to provide any responses. Defendants represent that their counsel attempted to contact plaintiff’s counsel about this and that, with one exception, he failed to respond to

defense counsel's correspondence or telephone calls. The one exception is a two-sentence letter dated November 9, 1998 in which plaintiff's counsel apologized for his failure to contact defense counsel, notified them of a change of office address and telephone number, and stated that he would "attempt to call you some time this week to discuss this case." It is uncontroverted that plaintiff's counsel did not contact defense counsel that week or at any time thereafter until defendants filed the instant motion to dismiss.

In response to the motion, counsel for plaintiff merely submitted a letter in which he stated that "interrogatories have not been completed because I have been unable to identify or obtain the necessary expert testimony for trial." Counsel offered no explanation regarding what sort of expert testimony he was seeking to obtain, why an inability to obtain expert testimony made it impossible to respond to any of defendants' discovery requests or, in any event, why he felt that despite a court scheduling order he had an indefinite amount of time to secure expert or any other witnesses. Counsel did state that he "informed [plaintiff] of the problem [regarding expert testimony] and the effect it would have on the case but I have not heard from him concerning whether he wishes to proceed." He asked the court to defer a decision on the instant motion for 20 days so plaintiff could decide if he wishes to proceed.

It has now been 35 days and plaintiff has still failed to respond to the instant motion. Plaintiff also has filed no pretrial submission or papers of any kind in this court.

A court may dismiss an action as a sanction against a party who fails to obey an order to provide discovery. See Fed. R. Civ. P. 37(b)(2)(C). A court may dismiss an action as a sanction against a party who fails to comply with the Federal Rules of Civil Procedure, including discovery rules, or any order of the court. See Fed. R. Civ. P. 41(b). a court also has the inherent power to dismiss a case that cannot be disposed of expeditiously because of the willful inaction or dilatoriousness of a party. See Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991); Link v. Wabash R.R. Co., 370 U.S. 626, 630-32 (1962). See also Hewlett v. Davis, 844 F.2d 109, 114 (3d Cir. 1988).

In assessing a motion to dismiss as a sanction, a court generally considers the so-called Poulis factors. See Harris v. Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995); Anchorage Assoc. v. V.I. Bd. of Tax Review, 922 F.2d 168, 177 (3d Cir. 1990); Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988); Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1987).[1] Not all of the Poulis factors need be satisfied to

[1] These factors include the extent of the party's responsibility for the failure properly to litigate; prejudice to the adverse party; any history of dilatoriness by the recalcitrant party; the willfulness of the offending conduct; the adequacy of any other sanctions; and, the merit of the underlying claims.

warrant such a sanction. See Hicks, 850 F.2d at 156.

It appears that counsel is at least somewhat responsible for the failure to respond to the discovery requests. It also appears, however, that plaintiff is increasingly responsible for failing to honor his counsel's request to advise whether or not he wishes to proceed in view of counsel's assessment of the case.

The inability during the allotted discovery period to obtain even basic information from a plaintiff regarding his claim is clearly prejudicial to a defendant in his attempt to defend against and obtain a prompt resolution of a lawsuit. See Adams v. Trustees, N.J. Brewery Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994) (prejudice encompasses deprivation of information from non-cooperation with discovery as well as the need to expend resources to compel discovery).

Defendant is not complaining about an isolated breach. Plaintiff has been totally recalcitrant in honoring his discovery obligations and in responding to defense counsel's communications regarding that recalcitrance. In the absence of any satisfactory explanation, the persistent failure to honor discovery obligations and the court's scheduling order must be viewed as "a willful effort to evade and frustrate discovery." Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980) (Rule 37(b)(2)(C) dismissal warranted for continuing failure to comply with court

ordered discovery). See also Jourdan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991) (Rule 41(b) dismissal warranted where plaintiff fails to engage in discovery); McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988) (Rule 37(b)(2)(C) dismissal warranted for failure to comply with court discovery order); Williams v. Kane, 107 F.R.D. 632, 634 (E.D.N.Y. 1985) (plaintiff's claim he was beaten without cause by officers dismissed pursuant to Rules 38(b)(2)(C) & 41(b) for failure to provide court ordered discovery); Booker v. Anderson, 83 F.R.D. 284, 289 (N.D. Miss. 1979).

On the other hand, defendants could have been more aggressive in pursuing their rights. They never previously moved for a formal court order compelling discovery responses or for sanctions.

A monetary sanction should be commensurate with and likely to deter the type of violation at issue. See National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976). Plaintiff does not appear to be a person of substantial means. Any meaningful monetary sanction, even one relatively modest to an individual of means, would, if collectible, likely rival dismissal in palatability.

The meritoriousness of a claim must be determined from the face of the pleadings. See C.T. Bedwell Sons v. International Fidelity Ins. Co., 843 F.2d 683, 696 (3d Cir.

1988); Poulis, 747 F.2d at 870. This factor is thus of limited practical utility in assessing dismissal under Rule 37 or 41. If a claim as alleged lacks merit, it would generally be subject to dismissal under Rule 12(b)(6) without the need to weigh other factors.[2] In any event, it is difficult conscientiously to characterize a claim as meritorious when the claimant refuses to subject it to scrutiny through the normal discovery process.

Plaintiff's violation of the federal rules and court scheduling order is rather flagrant. It has resulted in delay and diversion of resources. There is an absence of any justification. Plaintiff invoked the judicial process and then effectively thwarted discovery, making impossible the proper and efficient litigation of this action. Plaintiff asked for 20 days

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[2] At least as pled, plaintiff does not appear to state a cognizable federal claim in his complaint. Even assuming that plaintiff had associational rights superior to or exclusive of his wife, there is no federal liability for the "negligent" denial of a constitutional right by a state actor. See Daniels v. Williams, 474 U.S. 327, 330-34 (1986); Shaw by Strain v. Stackhouse, 920 f.2d 1135, 1142-43(3d Cir. 1990); Owens v. Philadelphia, 6 F. Supp.2d 373, 378 n.4. (E.D. Pa. 1998). There is no respondeat superior liability for federal constitutional violations. See Monnell v. Dept. of Social Servs. of City of New York, 436 U.S. 658, 691-94 (1978); Montgomery v. DeSimone, 159 F.3d 120, 126 (3d Cir. 1998); Olender v. Twp. of Bensalem, 32 F. Supp.2d 775, 783 (E.D. Pa. 1999). To sustain a failure to train or supervise claim, a plaintiff must allege that the relevant municipal policymaker or supervisor acted with deliberate indifference to the constitutional rights of those with whom the police come into contact. See City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989); Montgomery, 159 F.2d at 127 (a plaintiff must show contemporaneous knowledge of offending incident or knowledge of pattern of similar prior incidents and conduct evincing approval or acquiescence).

to respond to the motion to dismiss or to advise the court and defendants of a decision not to proceed with the case. He has been afforded 35 days and yet failed to do so.

The court will give plaintiff a final opportunity to provide discovery and file the submissions required under the court's scheduling order or to advise the court of his election not to proceed. Should he fail to do either, the court will dismiss this action.

ACCORDINGLY, this day of April, 1999, upon consideration of defendants' Motion For Sanctions For Failure to Prosecute (Doc. #10) and consistent with the foregoing, **IT IS HEREBY ORDERED** that the resolution of such motion will be deferred until May 12, 1999 at which time it will be granted unless plaintiff has by noon on that day certified to the court that he has responded to the outstanding discovery requests, has filed the required pretrial submissions and is prepared diligently to proceed with the prosecution of this case.

BY THE COURT:

JAY C. WALDMAN, J.